UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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March 20, 2001

The Vast, Unexplored Implications of Section 304

Does McCain-Feingold Stand *Beck* on Its Head?

Section 304 of the McCain-Feingold campaign finance bill (S. 27) is titled "Codification of *Beck*." Critics doubt that the section will perform as advertised. This would not be the first time that a title failed to describe the true consequences of the contents.

Section 304 seems to pre-empt *Beck* but not codify it. Passage of McCain-Feingold would give us a new rule, but it wouldn't be the rightful rule of *Beck*. Indeed, *Beck* might be grabbed by the scruff of its neck and stood on its head.

"*Beck*" is shorthand for the U.S. Supreme Court's 1988 decision in which the National Labor Relations Act (NLRA) was interpreted to mean that nonunion employees in an agency shop cannot be required to pay for any union activities to which they object, except those that are "necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (quoting *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 448 (1984)).

- **The *Beck* court construed the NLRA to *forbid* the use of dues or fees for any purpose not reasonably necessary for collective bargaining with the employer.**

- **The McCain-Feingold bill, on the other hand, *permits* all uses of dues and fees *except* for those few that it expressly prohibits.**

Under the definitions of McCain-Feingold, dues-paying nonmembers may protect themselves *only* against "political activities unrelated to collective bargaining," which the bill further defines as expenditures "in connection with a Federal, State, or local election" and expenditures "in connection with efforts to influence legislation unrelated to collective bargaining." These restrictions and definitions may sound helpful, or at least innocuous, but in their context they are not.

The premises of McCain-Feingold are contrary to and incompatible with the premises of *Beck*,

and fundamentally so. The differences are illustrated in the following example:

In a hypothetical local union, suppose the union spends 20 percent of its income on collective bargaining with the employer (which is just about what the district court found in *Beck*, 487 U.S., at 740) and another 20 percent of its income on what the McCain-Feingold bill calls "political activities unrelated to collective bargaining."

Under *Beck*, an objecting, dues-paying nonmember would be required to pay 20 percent of what union members pay because that is the percentage of dues and fees germane to collective bargaining. All other subsidies are forbidden.

Under McCain-Feingold, however, the proportions get jerked upside down: Under the bill, 20 percent of regular dues are protected against particularly defined "political activities," but the other 80 percent has to be paid! In the hypothetical, therefore, the McCain-Feingold bill would quadruple a nonmember's compulsory dues and fees, and those payments would be used to fund some of the most emotional and divisive issues of the day. It need hardly be added that labor unions, unlike millions of their members, give unwavering and nearly unanimous political support to just one of the country's major political parties and its candidates.

- **The *Beck* decision protects that which isn't mandated.**

- **The McCain-Feingold bill upends *Beck* by mandating that which isn't prohibited — to the detriment of workers' rights to self-determination and political independence.**

The hypothetical above shows the contradictory premises of *Beck* and McCain-Feingold. The table on the next page shows the differences more concretely.

In the table, Column A shows the general rule and some of the more important expenditures that dissenting, dues-paying nonmembers *are required* to pay under the law of *Beck*. The expenditures of Column A are mandatory, but other costs can be avoided altogether.

Column C shows the expenditures that a dissenting, nonmember will be able to avoid if McCain-Feingold becomes law. Column C merely quotes the bill, and its provisions are narrow.

Column B is the key. <u>Column B shows some of the expenses that objecting nonmembers will have to pay under McCain-Feingold — although these expenses are not now chargeable under *Beck*</u>. Column B shows how enactment of the bill will upend current law.

If McCain-Feingold is enacted, a dissenting nonmember will have to pay *both* the costs shown in Column A *and* the costs shown in Column B. *Beck* built a fire wall between Columns A and B. McCain-Feingold tears it down but puts a picket fence around Column C. Some people mistakenly call this "codifying" *Beck*.

Required and Prohibited Payments From Dues-Paying Nonmembers Under *Beck* and Section 304 of McCain-Feingold (S. 27)

Column A	Column B	Col. C
Required Under *Beck*	**Ten Expenses that Objecting Non-Members <u>Cannot</u> Be Made to Pay Under *Beck* But Will Be Required to Pay Under §304**	**Forbidden by §304**
Expenditures that are "necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *Beck* at 762-63, *e.g.*, negotiating and administering contracts; settling grievances and disputes; costs of litigation incident to negotiating & administering contracts & settling disputes concerning the bargaining unit; also, costs of union benefits available to members and nonmembers alike, and other costs	**1. Union organizing activity, whether in the represented unit or outside of it**	"Expenditures in connection with a Federal, State, or local election"
	2. Litigation that does not "directly concern" the bargaining unit	
	3. Union publications to the extent that they report on non-representational activities	
	4. Lobbying the Executive Branch or an administrative agency; lobbying Legislative Branch on nominations, impeachment, etc.	"Expenditures in connection with efforts to influence legislation unrelated to collective bargaining"
	5. Promotion or defeat of legislation "related to" collective bargaining	
	6. Political campaigns not "in connection with" an election, such as voter registration drives and political rallies; political research and polling; perhaps political operatives; ideological causes and general issues advocacy; ballot questions on bonds, constitutional amendments, and referenda	
	7. Overhead costs of labor union PACs	
	8. Advertising relating to non-chargeable matters	
	9. Union benefits not available to nonmembers	
	10. Union building funds	

Expenses that are non-chargeable under *Beck* and shown in Column B are derived from Memo. of the General Counsel, National Labor Relations Board, No. 88-14 (November 15, 1988).

The table shows some of the concrete changes that McCain-Feingold will bring. Some of those changes are of vast consequence:

Union organizing and litigation expenses. Shrinking membership poses a fundamental problem for America's labor unions, and the unions are committed to fighting the decline — in part by using fees and dues from objecting, dues-paying nonmembers. This issue currently is being fought-out in the courts. *United Food & Commercial Workers Locals 951, 7 & 1036* (*Meijer, Inc*.), 329 NLRB no. 69, 162 LRRM 1177 (1999) (in a reversal, Board held that objecting nonmembers *must pay* the costs of organizing other workers in the same competitive market), on appeal to the 9th Circuit. The costs of litigation, like the costs of organizing, are fundamental and essential, and there is a struggle now going on. See, *e.g.*, *California Saw & Knife Works*, 320 NLRB 224, 239 (1995) (notwithstanding Supreme Court's holdings in *Ellis v. Brotherhood of Railway Clerk*, costs of litigation can be charged to objecting nonmembers even when *not* "performed for the direct benefit of the objector's bargaining unit"). The McCain-Feingold bill wades into these sensitive and essential areas while advertising itself as nothing more than a simple "codification" of *Beck*.

Union publications. One expert says, "The most valuable *in kind* services provided by unions to the Democrats are the unions' journals and newspapers. These are mailed out to some 16 million members of unions, implying a minimum household audience of 30 million potential consumers of the unions' political point of view. These publications are issued mainly by the national and international unions (parent organizations), but also by many local and intermediate unions. In addition, many unions maintain websites to transmit the official union line. The union media is biased in favor of the Democrat Party. In fact, the political views are so biased that it is no exaggeration to characterize the union media as a one-party press. The membership funds the union media from its dues and agency shop fees. Since these monies are collected almost entirely under compelled arrangements . . ., members and those represented by the unions are compelled to pay for political programs and candidates which they may not support, and in very many instances do not endorse." *Hearings on Constitutional Issues Impacting Campaign Reform before the Comm. on Rules and Administration*, 106th Cong., 2d Sess. 429 (2000) (Senate Hearing 106-522) (statement of Prof. Leo Troy, Rutgers University).

Lobbying. The McCain-Feingold language will not protect dissenting nonmembers from paying for lobbying on some of the most important — and emotional and divisive — issues of the day. These issues come before the Congress, but they do not involve "efforts to influence legislation." The McCain-Feingold bill does not protect nonmembers with respect to nominations, such as the Bork, Thomas, Chavez, and Ashcroft nominations. Nor does the bill protect the dues and fees of nonmembers when labor unions are lobbying the Executive Branch and the independent agencies with respect to the thousands of issues they handle each year.

Promotion or defeat of legislation. McCain-Feingold does fence-off expenditures "in

connection with efforts to influence legislation unrelated to collective bargaining" — but what does it mean to be "unrelated to collective bargaining"? We can expect the unions to advocate a very narrow interpretation of "unrelated" and a very broad interpretation of "related." They might argue, for example, that everything that relates to the workforce is "related to" collective bargaining.

Political campaigns. The political activity of labor unions is vast. McCain-Feingold protects dues-paying nonmembers if the expenditures are "in connection with a Federal, State, or local election." That definition is not nearly sufficient:

"Extremely valuable services which unions provide the Democratic Party are political operatives whose salaries are paid by the unions. The two teachers unions, the National Education Association and the American Federation of Teachers, are reported to field more political operatives than the combined number of the Republican and Democratic Parties. . . . This is particularly significant because these are professional operatives and activists, not volunteers who may be amateurs." *Hearings*, *supra*, at 428 (statement of Prof. Troy).

> "[M]any of the ideological battles joined by labor officials concern highly controversial issues wholly unrelated to the union's role of representing workers to their employers, including:
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> "Abortion. Through their various political committees, the following unions have made contributions to Emily's list: AFL-CIO, AFSCME, CWA, SEIU, UAW.
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> "Balanced budget. AFSCME made the defeat of the Balanced Budget Amendment its 'number one' legislative priority in 1995.
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> "Official English. The NEA, UAW and AFL-CIO have lobbied against legislation making English the official language of the United States. Eighty percent of Americans support such legislation.
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> "Racial preferences. The AFL-CIO recruited and trained 1,000 activists in 1996 to, among other things, fight the California Civil Rights Initiative (CCRI), the successful ballot measure ending racial preferences in California state hiring and contracting. Other unions that campaigned against CCRI included the California Teachers Association, the United Farm Workers, the Coalition of Black Trade Unionists, and local affiliates of the American Federation of Teachers and the SEIU. Meanwhile, 80 percent of Americans of all races oppose racial preferences.
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> "Taxes. The AFL-CIO lobbied against passage of the $500 per child tax credit and other tax-reduction measures.
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> "Welfare reform. AFL-CIO President John Sweeney described the 1996 welfare reform law

as 'anti-poor, anti-immigrants, anti-women and anti-children.' AFSCME aggressively lobbied against imposing any time limits on cash benefits to welfare recipients." *Hearings*, *supra*, at 568-69 (policy paper by Americans for Tax Reform) (footnote omitted).

California's "paycheck protection" referendum, Proposition 226, was defeated with the help of much union money. See, *Hearings*, at 593-94 (article by co-chairman of the Proposition 226 campaign). Under McCain-Feingold, dissenting nonmembers, most of whom probably are strong supporters of paycheck protection laws, will see their dues and fees, formerly immunized under *Beck*, paying for the defeat of paycheck protection referenda.

Overhead costs of PACs. "[T]he law permits the connected organization to pay start-up, administrative and fundraising expenses for a separate segregated fund." F.E.C., "Campaign Guide for Corporations and Labor Organizations" at 7 (Aug. 1997). Because McCain-Feingold tears down the fence between Column A and Column B, dissenting nonmembers are going to find themselves paying for the overhead costs of their union's political action committees (formally known as separate segregated funds).

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